The standard model of criminal liability is beautiful in its simplicity. Take homicide and imagine a crowd outside a nightclub. The proverbial shot rings out, a person falls, and a suspect is identified and charged with the killing. The law of homicide prohibits the taking of life without excuse or justification. A jury must answer two questions as a result: First, a question about conduct and causation, or actus reus: did the suspect cause the victim's death, by firing a shot that hit the victim and ended his life? Second, a question about the defendant's mental state, or mens rea: did the suspect cause this death intentionally, or was he aware of the risk he was imposing, or—at the least—would a reasonable person have been aware of that risk? If the answer to both questions is yes, then the defendant will be convicted of some form of homicide, depending on his degree of deliberateness or awareness.

Saying that these are easy questions does not imply that their answers are easily forthcoming. The basic facts will be in dispute, and coincidences may complicate the answer. Perhaps the suspect genuinely believed it was a toy gun, or cigarette lighter, that he was demonstrating; if so, no mens rea, and no liability. Or perhaps the victim had collapsed from a drug overdose moments before he was shot; if so, then no causation. Nonetheless, the basic liability package is clear: a responsible defendant (i.e., capable of rational self-regulation) who acts intentionally or otherwise culpably to cause social harm, and in fact does so.

Moral philosophy and the philosophy of punishment are clear about the wrong as well. No Kantian could reasonably universalize a maxim of doing deliberate or (p. 148) indifferent lethal harm in a world in which we must expect reciprocal concern from others. Hence we may call for retribution, in the form of a social principle of deliberately harming those who deliberately harm others. No utilitarian could think such behavior socially worthwhile, in the absence of any special justification. We must inflict suffering, lest this defendant or others be emboldened by the success of his antisocial behavior. (Perhaps we should add some rehabilitation, for further behavioral benefit.) And with the deliberateness or other form of culpability established, no liberal could object to the infliction of punishment on someone who so chose to flout the norms of criminal law. 1 While skepticism is possible, for example about the role of moral luck or freedom of the will, the basic conceptual questions of moral culpability and liability to punishment are basically overdetermined in the single actor case.

Inchoate liability, for attempted acts of social harms, represents the first form of complication. Doctrinally, inchoate
liability appears simple at first blush: it merely peels away from the basic liability package the causation element, so we are left with the causally inert package of intentional (or otherwise culpable) conduct by a responsible agent. In fact, doctrinal questions complicate quickly, as soon as we move away from an insistence on tying liability to the final stage of conduct that would otherwise have caused harm—to the pull of the trigger or the lighting of the match, for example. Once a criminal “attempt” may be found to lie in some course of conduct short of that last step, criminal law must settle a range of difficult boundary questions about the sufficiency of the actus reus: what extent of conduct suffices to warrant punishment, and is necessary to prove the existence of criminal intent?

Return to the nightclub fight and stop the action earlier, with a patron pulling a gun from his waistband, but now wrestled to the ground by a bouncer. Can such an act, accompanied by further evidence of intent, be enough to ground a charge of attempted murder?2 Framed normatively, the question is yet more contested: given that no harm actually occurred, is the attempt to impose harm sufficient to legitimate punishment? Retributivist theories, based in occurred harms, would seem to have no clear answer whether nonharmful conduct can warrant suffering in return. Instrumentalist theories must weigh the benefits of deterring socially risky behavior against the costs of punishing conduct that might not have been consummated in a final act.

But the complexities of inchoate liability pale in contrast to accomplice liability. Return one last time to the nightclub: two patrons are squared off and angry, when a third person in the crowd hands a gun to one of them, saying, “Give him what he deserves.” The fighter who has been handed the gun shoots and kills. Clearly, he is guilty of some form of homicide, and morally responsible for that act. But both morality and law insist that the fact that only he pulled the trigger does not exhaust the question of responsibility. The onlooker with the gun also contributed to the death—notwithstanding that it was the shooter’s decision whether to pull the trigger, and independent of whether the shooter might have killed with a knife instead. The act of handing a gun itself causes no harm and violates no legal norm.3 But this basic principle, that indirect contribution to someone else’s bad act can render one responsible for that act, is subject to a vast range of challenges and questions. Consider now some casebook chestnuts and real variations:

1. Judge Tally has learned that his sister-in-law has been seduced by a cad, Ross, and that his brothers-in-law, the Skeltons, are planning to kill Ross. Tally also learns that a friend of Ross has just sent a warning telegram to be delivered to Ross, in the town where he has fled. Acting quickly, Tally sends a second message to the telegraph operator in that town, instructing him not to warn Ross. As a consequence, the warning telegram is not delivered. However, since the Skeltons are already hot on Ross’ trail, there is little reason to think the warning would have had effect in any event. The Skeltons catch up with Ross and gun him down. Query: Is Judge Tally also guilty of Ross’s murder?4

2. Iago, seeking to frame an innocent, persuades his jealous commander, Othello, that his wife has been unfaithful. Iago plants evidence, insinuates Desdemona’s betrayal, and then, as Othello’s jealousy rises to fever pitch, suggests that Othello strangle her. Othello does and is charged with murder, but is convicted only of manslaughter, on the ground that most people, in the circumstances, might have behaved in similar fashion, and so is not fully responsible for his acts. Query: Is Iago guilty of a more serious crime?5

3. Nahimana, a producer at a Rwandan radio station, set editorial policy and wrote editorial scripts for a radio station urging members of the Hutu tribe to take up arms against Tutsi tribe members, both in general and in specific cases, who were accused of planning to assassinate Hutu political figures. Query: Is Nahimana guilty not only of “incitement to produce genocide,” but of the resulting genocide itself?6

4. Maxwell, a member of a Protestant Irish militant organization, was asked to drive his car to an inn owned and frequented by Catholics, thus leading a car containing four strangers to the inn. Maxwell did not know what specific crime was intended, although he knew it was a “military operation” of some sort. Query: Is Maxwell guilty of the pipe-bombing of the inn conducted by the four strangers?

These cases raise a number of extraordinarily difficult questions about the ascription of responsibility within both morality and criminal law. The Judge Tally case asks whether a defendant must have made a clear difference to an outcome, in order to be judged culpable for that outcome. Iago challenges us to distinguish the culpability of the coolheaded instigator from that of the hot-blooded perpetrator. Nahimana poses the question whether rhetoric can be the attributable cause of another’s crime. The scale of the act of genocide also raises the question whether complicity, amplified by technology, can result in too great a scope of liability. And Maxwell asks whether foresight of another’s crime can be treated as the equivalent of an intention to commit that crime.
These questions arise within criminal law, in relation to the formal concepts of intent and cause. They also reflect a specific dialectic within criminal law, between its backward-looking, retributive structure and the forward-looking, risk-reducing aims that have become an increasing part of its modern justification. A retributive view of criminal law puts pressure precisely on the difficult points of interpersonal causation and joint activity, while an instrumentalist conception, like that embodied in the U.S. Model Penal Code, rests on vaguer grounds, such as whether a given defendant has manifested some form of social dangerousness, independent of the causal efficacy of the particular role he played.

These problems of criminal law are equally philosophical challenges. While ascriptions of interpersonal causation are part of the bread and butter of daily life—“He made me do it!” is a defense often heard at home—and while talk of complicity permeates politics and social life, the subject demands a philosophically rigorous investigation. Criminal law, as a systematic body of law in which questions of causation are resolved and attributions of responsibility are made, provides a nearly ideal forum for working out the lines of such an investigation.

My aim in this chapter is to explore the philosophical interest of the problems raised by accomplice liability, and then to make my own case for several propositions, some specific to complicity law, and some to theories of responsibility generally:

1. The normative justification for accomplice liability generally is the risk-enhancing character of aiding or encouraging another's criminal efforts. That is, accomplice liability is best conceived as a form of inchoate liability at the level of act-type criminalization.

2. The basis of accomplice liability for a particular defendant is an analytically distinctive intent to further a shared goal (what I have called elsewhere a “participatory intent”) whether or not the perpetrator knows the goal is shared, not the specific conduct of the accomplice or its consequences. Such an intent satisfies a range of theories of legitimate punishment, including liberal harm-based and liberty-maximizing theories.

3. Three consequences for complicity doctrine follow:
   i. Causation, at the level of the token contribution, need not be shown, nor need one adopt a particular theory of causation in order to make sense of complicity doctrine. One need only show that the act of assistance or encouragement was of the right type to make a difference.
   ii. Criminal liability, and retrospective responsibility generally, must be understood pluralistically, not reductively: a range of bases can establish a warrant for sanction, including intentional participation, affiliation, causation, and risk-imposition.
   iii. Knowing facilitation may be a useful category for criminalization, but it is analytically distinct from the participatory intent characteristic of complicity law.

I do not propose to demonstrate these conclusively, although I will present my own views of their merits. The plan is as follows: first, I set out briefly the basic legal elements of complicity law, concentrating on Anglo-American law. Next, I will examine the key notions of philosophical interest: causation, joint action, and intentionality. I then consider the different valences of responsibility, as between accomplices and direct perpetrators. Last, I look to the outer limits of accomplice liability, as reflected primarily in liability for mass atrocities.

II Basic Elements of Complicity Law

Complicity doctrine renders one person liable for the criminal act of another when the accomplice (usually called the “secondary” party, whom I will call S) intentionally aids, encourages, or both, the direct perpetrator (whom I will call P) in the commission of that act. The most basic point about complicity liability is that complicity is not itself a crime, but rather a mode of individual liability cantilevered out from the basic model of individual criminal liability. Thus, accomplice liability is part of the system of ancillary liability models that include inchoate (attempt) liability and vicarious liability (liability in virtue of a preexisting relationship). Its distinctive doctrinal elements and liability scheme must be understood in relation to that basic model. The hornbook phrase is that accomplice liability is derivative, grounded in the liability of the principal. This is true, in the limited sense that at common law, there can be no accomplice liability unless a principal has at least attempted a crime. But the elements of accomplice liability are defined independently, not derivatively, in terms of the more basic concepts of individual direct liability.

With jurisdictional and analytical caveats and exceptions to follow, we can sketch out the hornbook elements of accomplice liability as follows: Someone is liable for the conduct of another as an accomplice if, prior to the other's
attempt at or commission of a criminal act, the first person does or says something that could assist or encourage the second in the commission of the act, intending that the second in fact engage in the criminal act. The physical conduct, or actus reus, element of complicity is evidently broad, and defined only in relation to acts of assistance or encouragement (including inducement); the mental, or mens rea, element is accordingly narrower, and requires that the accomplice have an intent closely analogous to that of the principal. Thus, one does not become an accomplice to another's burglary merely by pointing out, to someone loitering on the street, that a house has a window open. Rather, one needs to point out the vulnerable window with the specific intent that the addressee enter with the aim of permanently depriving the owners of property.

We can take a first schematic cut at the modes of direct and indirect individual liability in the table:

The table reveals straightaway the most striking feature of accomplice liability: the asymmetry, or one-way dependence, between S's and P's liability. P's liability turns strictly on whether P has performed the actus reus with the requisite intent. If so, and regardless of the outcome, P is liable for at least an attempt. And when P does so, if S has incited, encouraged, or aided P (with or without knowledge by P), then S is liable, too—in most jurisdictions, moreover, liable as if S had himself performed P's act. But if P does not make at least a culpable attempt, S bears no liability at all—even though every other basis for S's liability remains the same. Imagine, for example, that S hopes to aid P's plan to murder a common enemy, by mailing P a more effective poison than the one at P's disposal. If P receives the poison and doses V's coffee with it, S has become a murderer or attempted murderer (as has P, of course). But if P decides at the last minute not to dose the coffee, or is otherwise prevented from getting far enough down the path to the poisoning for P's act to constitute an attempt, then S's potential liability has shifted from murderer to nothing, even though he acted with murderous intent and despite no change in his conduct.

This anomaly, which has been the object of reform attempts in both the United States and United Kingdom, reflects a conceptual gap at the heart of complicity law, and it is difficult to justify under any plausible penal theory that includes inchoate liability. If S's moral culpability is equivalent under both scenarios, as well as the riskiness of S's behavior in mailing a more dangerous poison, then it is hard to find a normatively persuasive basis for distinguishing liability. The anomaly represents a substantial moral luck effect within criminal law.

There is another anomaly as well, revealed in another table. The previous table focused only on cases of deliberate complicity, where S has the purpose of encouraging or assisting P's commission of the crime. But an important range of cases involve holding S to a weaker standard of culpability: knowledge, foresight, or recklessness as to P's commission of a crime.

Generally speaking, English and civil (including international criminal) law make knowing or foreseen provision of aid or encouragement a basis for criminal liability, while most U.S. jurisdictions do not.\(^8\) (Some U.S. jurisdictions,

<table>
<thead>
<tr>
<th>P acts/attempt?</th>
<th>S liable?</th>
</tr>
</thead>
<tbody>
<tr>
<td>S encourages</td>
<td>✓</td>
</tr>
<tr>
<td>S acts via innocent P</td>
<td>✓</td>
</tr>
<tr>
<td>S &amp; P jointly act</td>
<td>✓</td>
</tr>
<tr>
<td>S instigates/solicits</td>
<td>✓</td>
</tr>
<tr>
<td>S instigates/solicits</td>
<td>✓ (for solicitation)(^7)</td>
</tr>
<tr>
<td>S gives aid</td>
<td>✓</td>
</tr>
<tr>
<td>S gives aid (known to P)</td>
<td>✓</td>
</tr>
<tr>
<td>S attempts to aid/encourage</td>
<td></td>
</tr>
</tbody>
</table>

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\(^7\) This situation might involve consenting to an act, and the liability might be based on the consent.

\(^8\) Some U.S. jurisdictions,
notably New York, have a lesser penalty for knowing facilitation.) To take a standard example: S works in a gun shop and serves a customer seeking to purchase a handgun that can be easily modified to accommodate a silencer. S strongly suspects that the customer intends a murder, but does not himself intend to facilitate a murder, only a gun sale. In the United Kingdom, the seller might well be liable for the resulting murder, unless shopkeepers are given a specific safe haven from liability. In France, in the famous case of Vichy collaborator Maurice Papon, Papon was held liable for crimes against humanity when he transported French Jews to the Nazis, knowing of their eventual fate though without any interest in bringing it about. By contrast, in the United States most courts have held to the requirement announced by Judge Learned Hand that an accomplice have “a stake” in the criminal venture, seeking for (p. 153)

<table>
<thead>
<tr>
<th>S's intent</th>
<th>P's act</th>
<th>S is liable as accomplice?</th>
</tr>
</thead>
<tbody>
<tr>
<td>S knows that P will engage in criminal act C</td>
<td>P does C</td>
<td>Yes in U.K., no in U.S.</td>
</tr>
<tr>
<td>S has agreed that P will engage in criminal act C</td>
<td>P does C</td>
<td>Yes in U.K., mostly in U.S.</td>
</tr>
<tr>
<td>S has agreed that P will engage in criminal act C</td>
<td>P does C and different criminal act C'</td>
<td>Yes, mostly, so long as C' is within scope of C</td>
</tr>
<tr>
<td>S believes P may engage in criminal act C</td>
<td>P does different and more serious act C'</td>
<td>Unclear</td>
</tr>
</tbody>
</table>

It to succeed, and that mere knowledge is not enough. But the requirements of that state can be satisfied rather easily. The so-called Pinkerton doctrine in federal criminal law, for example, which makes conspirators liable as accomplices for foreseeable acts committed by coconspirators within the scope of the conspiracy, has the effect of extending accomplice liability for intentional crimes to defendants who merely foresee the crime. Thus, with the addition of facilitation or co-conspirator liability, complicity doctrine involves a second significant anomaly: P must satisfy a stricter culpability standard than S for the same crime. A major task for a philosophical reconstruction is determining whether this disparity can be given a principled basis in complicity law, for instance in a claim that the affilative character of complicity makes room for a looser mens rea standard, under principles of vicarious, principal-agent liability, or whether it is an undesirable inconsistency better handled through a separate form of criminalization.

The final, striking feature of complicity doctrine does not appear within these tables at all, and this is the peculiar equivalence of accomplice and direct liability. Within Anglo-American and much civil (but not German) law, accomplices are treated as liable to the same punishment as direct perpetrators. This is a long-standing principle in the Anglo-American common law, codified uniformly by statute, and true as well in most other jurisdictions. The notable exception is Germany, where aiding accomplices are given a significant discount from their principals’ sentencing, although inducing accomplices are given no such discount. The equivalence of accomplice and principal liability is peculiar because, in the case of attempt liability—arguably the closest analogue to accomplice liability—by far the dominant pattern is a systematic reduction in punishment. While neither the attempt discount nor the accomplice non-discount might be justifiable in the end, one might think there is a substantial argumentative burden to be met for a principle of punishment that does not distinguish between offenders who do, and do not, complete the actus reus of the target offense. A bank clerk who provides a surveillance schedule, endorsing a robbery plan that includes killing a guard, has done something terrible. But the position that the clerk should be treated as a killer of the guard requires argument, to say the least.

(p. 154) There remain a number of puzzles within complicity doctrine that do not generate so much philosophical as simple policy interest, such as whether one can become an accomplice to a crime of strict liability—for example, by urging another to have sexual relations with a partner who, unbeknownst to both, is underage—or whether, if liability is extended, it extends to foreseeable as opposed to actually foreseen harms. There are equally questions about the role of aid or encouragement that cannot possibly make a difference, whose blameworthiness (like other
forms of inherent impossibility) will turn ultimately on a balancing of antisocial animus against the conservation of penal resources. I turn instead to the chief philosophical puzzles.

III Puzzle: Causation and the Accomplice

The beginning of philosophical wisdom about complicity lies in Sanford Kadish's classic article "Complicity, Cause and Blame: A Study in Doctrine." Kadish argues that complicity doctrine functions as a complement to direct perpetrator liability, providing a form of culpability when ordinary notions of physical causation cannot supply a sufficient ground. Sometimes, the difficulty is said to lie in the legal maxim of novus actus interveniens—the idea that causal chains, hence ascriptions of moral and legal responsibility, are cut by others' freely chosen acts. The maxim indeed states a general normative principle that an individual's voluntary choice provides a basis for imputing responsibility to that individual—as evidenced in the lameness of the excuse “Everyone's doing it.” But this maxim, most obviously found in criminal-law cases involving suicide, is more honored in the breach outside the suicide context. In fact, we routinely recognize both causation and responsibility to flow along interpersonal channels as well, as when one person instigates another to commit a crime.

Contrast two examples, where claims of interpersonal causation might, and might not, go through. In the first, S, intent on murdering P's spouse, V, puts poison in the sugar that he knows P will give her, but without telling P. In such a case, S will be charged as the perpetrator of the murder and deemed to have used P as an "innocent agent," an instrument of S's will, and P was not the real killer, S was! We might say—and the law will draw a comparable conclusion, treating P as the "innocent instrument" of S's "procuring of the crime." Even if P is later pleased at V's death, S is deemed in both law and ordinary morality to have been the principal cause and perpetrator of the death, while P is excused from liability. Causation, running through P's voluntary but ignorant acts, connects S directly to the proscribed harm, such that P's actions are seen merely as an instrument for S to realize his goals.

In a second case, S and P discuss V's shoddy treatment of P. S agrees that V's behavior toward P has been disgraceful, and suggests that P punish V. S gives P poi son to put in V's coffee, disguised as sugar, and P does so, poisoning V. Now, it may have been the case that P would not have acted but for S's encouragement and assistance. Ordinary language reflects this: we might say that S's persuasion was a cause of V's death, or even its instigation. But it would take matters a step further to identify S as the cause of V's death, even if, but for S's intervention, V would still be alive. This is so not just because P's acts contribute to V's death, but because the proposal became, once accepted by P, a project of P's own will. This internal, subjective element of will formation, according to Kadish, is what resists incorporation into the external, objective notion of causation in criminal law. Criminal law marks the distinction in the form of liability by treating S as the accomplice to rather than perpetrator of V's death, and excluding the prosecution from the need to prove causation in this instance. Whereas P's liability lies in the causing of V's death without justification or excuse, S's liability lies in assisting or encouraging P, with the intent of furthering the murder. Complicitous encouragement; not causation, provides the linchpin of liability.

One must bear in mind that Kadish's point is not that complicity in every case fills a causal gap, or that direct perpetration is in every case causal—or, more important, that causation is well defined in criminal law:

I do not mean to say that the language of causation is inappropriate when dealing with one person's influence on the actions of another even when the latter's actions are entirely volitional. We commonly speak of one person occasioning the actions of another or of one person's action being the result of what another person says or does. This is appropriate because causation, broadly conceived, concerns the relationship between successive phenomena, whether they have the character of events or happenings, or of another person's volitional actions. The point I mean to stress is that in dealing with the influence of one person upon the actions of another, we refer to a different kind of causal concept than that involved in physical causation. However philosophers may dispute the point, as far as the law is concerned, the way in which a person's acts produce results in the physical world is significantly different from the way in which a person's acts produce results that take the form of the volitional actions of others. The difference derives from the special view we take of the nature of a human action.

This point is well taken. Legal theorists, making use of philosophical discussions, divide on the best metaphysical account of causation: whether it is a matter of counterfactual dependence (“c caused e” is true if and only if, if c hadn't occurred, e would not have occurred); conditional dependence (“c caused e” is true if and only if c is a
nonredundant element of a set of other nonredundant conditions sufficient for the occurrence of e); probabilistic relations (“c caused e” is true if and only if the occurrence of c raised the probability of e's occurrence); or a brute, singular physical relation involving the transferal of forces. And there is room for further debate whether criminal law's (or tort's) distinctive use of the term "causation" means anything more than "the sort of relation for which liability is appropriately imposed," and for which a normatively constrained sine qua non relation is the best approximation.

(p. 156) In fact, descriptive metaphysics is less the issue than normative significance. We might agree that the cause of the house burning down was both the faulty circuit and the failure of the fire department to turn up in time to douse the flames—even though the metaphysically parsimonious would not recognize the omission as a genuine cause. While fire investigators and tort lawyers might further disagree about which is to count as the cause, that disagreement lies in policy, not philosophy. The issues of overdetermination and interagent causation presented by complicity are similar. The central issue of causation lies in the attribution of relative degrees of significance, more than in the resolution of the puzzles of overdetermination. Overdetermination cases present a verbal puzzle, choosing the appropriate formulation of a causal condition that respects the way in which energies or productive efficacies (in whatever Molièresque formulation one prefers) flow into a jointly realized event. But once we have a formulation, for example the strong "NESS" (Necessary Element of a Set of Sufficient Conditions) test, according to which each contributor to an overdetermined event can count nonetheless as a part cause of the event—in this case, because each might be deemed a nonredundant element of a set of conditions jointly sufficient for the event—then the verbal problem of overdetermination is solved. Not so the normative problem, which requires establishing the punitive (or normative) significance of an overdetermined contribution, so that a treatment for the contribution can be established.

A classic example by Jonathan Glover illustrates well the question of normative significance, and brings out some of the difficulties in assigning normative weight to complicitous behavior. Glover offers two variants of a situation in which a group of thieves descends on a group of hungry villagers. In variant A, thirty thieves working separately descend on thirty hungry villagers, each with a bowl of thirty beans. Each thief takes all the beans from a villager's bowl, resulting in thirty hungry villagers. Clearly each thief is guilty of a serious theft, causing a villager to go hungry. In variant B, the thieves again descend, but with a common plan that each now take a single bean from each villager. There are still thirty hungry villagers, but no thief has individually made a significant difference to any one of them.

We might render matters more salient by assuming that each villager dies of starvation as a result of the theft of his or her beans. The question is whether the difference in individual causal agency adds up to a moral difference, such that we can regard the thieves in variant A, but not in variant B, as murderers. Following the route of causal efficacy, however, leads to many puzzles. On the one hand, each thief in A directly causes the death of a particular villager, and so each might be accountable for a single death. In B, no thief directly causes any death, so none might be counted a direct murderer. But if we take seriously the fact that each acted according to a plan, then each thief in B might well be regarded as worse, for each has causally contributed to each death. Indeed, to stretch the example further, we might even treat each as a necessary part of an unnecessary but sufficient condition of each death, if leaving a single bean might have extended a villager's life. So, in variant B, we seem to have a situation in which each acts thirty times worse, even though it is only in A that a thief's acts are individually sufficient for death.

(p. 157) It is, of course, difficult to discuss the example without presupposing the moral category under discussion: complicity. But the example does help us see the smoothing effect of complicity, as it ironizes otherwise sharp gradations in causal contribution.

As I have written before, moral responsibility in such situations is best understood not separably, in terms of individual causal relations, but collectively, in terms of what the gang has done. The thieves’ responsibility must be understood inclusively: each is included in the group that did the wrong, and bears responsibility qua member of that group. The basis of responsibility in such a case is not the difference an individual contributor makes, but the common plan, mediated by each individual's intention to participate in that plan. The anomaly in the responsibility between individually acting thieves in A and collectively acting thieves in B stems from different intentions with which each group acts. In A, the basic subject of the act is the individual thief, whereas in B it is “we thieves,” from which an individual role is derived. The different, individual vs. collective, bases of responsibility,
then, explains the different scope of responsibility. By contrast, if the thieves in A were to have agreed that each would steal all the beans from a single villager, then the basis of their responsibility would be the same as that of the thieves in B, rendering them, too, responsible for all thirty deaths.

Complicity doctrine functions in law as it does in morality—eliding individual inquiries into causation by treating the harm intended (what I intend to do as part of our act) as the basis for criminal liability. A further virtue of the category of complicity is that it avoids not just the problem of establishing the normative significance of individual causal responsibility but also the epistemic problem of determining ostensible causal contributions in the first place. The standard example is the robbery-shootout, where neither robber is willing to identify the other as the triggerman. With a criminal complicity doctrine, the state need only show a common plan to threaten violence in order to render each liable for the death.24

Now, one might still insist, against the overall shape of the doctrine, that causal responsibility lies at the root of complicity, both in the tendency of each accomplice to fortify the will of the others (and so to contribute horizontally, as it were, as well as vertically, toward the harm) and in the difference each contributes to the realization of the harm. English criminal law scholar K. J. M. Smith takes such a line, noting that while the case law is contradictory, and while administrative ease often makes determination of causation impossible, nonetheless the basically causal structure of complicity can be discerned in its derivative nature.25 On this argument, the historic form of accomplice liability, which treated the “causing” principal as the basic site of liability, as well as the now-abrogated distinction between accessories and principals more broadly, points to the causal core.

Perhaps. But one might equally find that legal doctrine is shifting philosophically as well as doctrinally away from a focus on objective causation to subjective intent, and so moving from causation to participation. This is, fundamentally, to shift accomplice liability from a harm to a risk, or inchoate, basis. The doctrinal (p. 158) argument for the inchoate nature of accomplice liability was nicely stated by the UK Law Commission:

An accessory's legal fault is complete as soon as his act of assistance is done, and acts thereafter by the principal, in particular in committing or not committing the crime assisted, cannot therefore add to or detract from that fault. Moreover, it is not the present law, and it is logically impossible that it should become the law, that the accessory must cause the commission of the principal crime; and for that reason also the actual occurrence of the principal crime is not taken into account in assessing the accessory's culpability. Even under the present law, therefore, where the principal crime has to be committed before accessory liability can attach, the conditions for the liability of the accessory should be, indeed can only be, assessed at the time of, and in relation to, that act of assistance.26

The issue here is not just whether accomplice liability is best conceived as a way of bringing about (causing) another's crime, but whether it is conceived as derivative in any robust sense—that is, with the principal's acts forming part of the basis of the accomplice's crime. As the Law Commission points out, as a conceptual matter accomplice liability forms a complete package in its own terms: the mental element is defined in terms of a subjective intent to assist another's crime, while the physical element is defined in terms of acts that further that subjective intent. Whether there actually is an act by a principal furthered by the accomplice's doings is immaterial to an assessment of their purpose, and so should be immaterial to an assessment of the accomplice's liability.

This is an argument from doctrine, not philosophical principle. And it comes into conflict with other pieces of doctrine, notably the rule cited by Smith: the derivative character of complicity. But if one treats that rule as a mistaken conclusion, then a new scheme of accomplice liability falls into place, one better aligned with both the actual elements of liability as well as the conceptual and normative reasons grounding that liability. Hence, the Model Penal Code's treatment of Judge Tally as equivalently liable whether or not he has actually contributed to a killing or merely tried. The vexed relationship between luck and causality loses importance under this view.

IV The Bases of Accomplice Liability

Once we see participatory intentions rather than causal contributions as at the root of complicity, then we can broaden the philosophical views we take of the normative basis of liability. Causal significance can still count as one factor in determining an appropriate social or legal response, but only as one factor. In some cases, a focus on participatory intentions means that we shift from backward-looking to forward-looking theories of liability. In
other cases, we can look to dimensions of character and moral valence that cut across the harm-done/harm-threatened division. In (p. 159) short, recognizing the distinctive basis of liability renders intelligible the plurality of bases for punishment.

Two examples, mentioned at the beginning of the chapter, will help to make this case. The first is Iago’s machinations, setting the stage for the tightly wound Othello to explode into jealous (if unfounded) rage. The second is Nahimana, whose responsibility for the Rwandan genocide lay in his contribution to a climate of hatred and violence, rather than his use of a physical weapon himself. Both played on the prejudices and sentiments of others, influencing but not causing their behavior. In both cases, the responsibility is serious enough—indeed perhaps graver than that of the direct killers—that it confirms the range of normative factors at root.

Iago, recall, is furious at Othello for promoting Cassio above him and plots revenge against them both. By insinuating a romance between Cassio and Desdemona (Othello’s wife), Iago is able to prompt Othello to a murderous rage, triggered finally by a piece of evidence planted by Iago’s wife, Emilia. Othello strangles Desdemona in her bed, only to realize quickly he has been set up by Iago. This is of course no excuse, in Shakespeare’s time or our own: Othello is guilty of at least voluntary manslaughter, and perhaps even second-degree murder, depending on a jury’s sympathies for the torments of misplaced sexual jealousy or the reasonableness of his suspicions. But Iago’s case is more complicated. On a derivative theory of accomplice liability, his own guilt cannot be greater than that of his principal. If Othello is guilty of manslaughter, to which Iago casually contributed, then Iago’s liability must be similarly limited. No antecedent cause can be responsible for a greater effect than its intermediary, after all.

But such an outcome is at odds with the force of the tragedy and moral common sense. Othello is too strong to be considered a victim, and Shakespeare is clear that honor alone does not compel him to kill—the murder arises more from his own insecurities, and proceeds with fair deliberation. But he is still essentially moved by a world of false clues Iago constructs around him: Iago, meanwhile, is not subject to the specific irrationality of sexual jealousy; Desdemona’s killing is the object of his plot, not an outbreak of passion. He is a deliberate murderer, without question. While Othello is more than a mere instrument of Iago’s will, Iago’s greater culpability is supported by the distinctive nature of his plan—the way it incorporates Othello’s agency.

In a less literary vein, the distinction between the manipulative secondary party and the principal of mitigated accountability arises whenever roles are differentiated and control (or power in some form) lies with the accomplice. The nurse who follows a doctor’s bidding to inject a euthanizing solution into a patient’s intravenous line is the direct instrument of killing, but primary responsibility for the killing lies with the doctor who gives the order. Similarly, a gang leader who sends foot soldiers into a neighborhood where violence is likely to erupt may be guilty of murder, though the factual killers are guilty of manslaughter. And it is of course possible that a secondary party might ask another to break into a house in order to seize property said (falsely) to belong to him. The accomplice would, in such a case, satisfy the intent requirement for burglary, while the principal might satisfy only (p. 160) the requirement for illegal entry. More striking yet is the German case reported by George Fletcher in which a KGB assassin was deemed to bear minimal responsibility relative to his controller, on the grounds that he was “alienated” from his act, regarding it as not fully his own. In all these cases, the distinction between the accomplice’s liability and the perpetrator’s is found in a range of subjective factors: capacity for self-governance, identification with the act, and incorporation of another’s agency into one’s own plan.

The lesson of Othello is that, in morality, indirect participation can be more serious than direct action. Alas, this lesson has been learned in a nonliterary way again and again, in the field of international criminal law. The issues of causation and accomplice liability that lie on the margin of individual cases come to the forefront in the cases of genocide and mass atrocity of recent decades. Such crimes are important not only because of their moral and political significance but also because of the complicated chains of influence through which they arise and are perpetuated. Return to the case of Nahimana, whose Rwandan radio station (RTLM) contributed to the fear and hatred at the root of the Tutsi massacre. Nahimana was charged with, among other things, both incitement to genocide and direct responsibility for that crime; he was convicted at trial. The prosecutor’s theory of the case rested on Nahimana’s authorship of a widely-distributed article, “Rwanda: Current Problems and Solutions”; RTLM’s advertisements for the hatred-spaying Hutu Power newspaper, Kangura; a number of radio editorials broadcast early in 1994; and a radio interview on April 25, 1994, in which Nahimana referred to Tutsis as “enemies.”
The connections between Nahimana and the genocide may seem stunningly weak, given the gravity of the crime charged. No direct causation could be shown, only a pervasive possibility of influence. This is inevitable: few cases of mass atrocity have at their roots a well-defined command structure, an arch-génocidaire giving orders to a few subcommandants. And even in those rare and well-defined cases, the mass aspect of the atrocity will still owe much to the less coordinated efforts of individuals like Nahimana, who share an ideology—and may even be significant contributors to its propagation—but nonetheless cannot be easily located within a causal chain.

Yet, as with Iago, if we abjure such cases of complicity and focus only on causation, we lose the broader moral canvas. We need not minimize the direct responsibility of the direct perpetrators, those carrying the machetes, if we at the same time recognize the indirect yet more extensive liabilities of the contributors. International criminal law struggles with this burden of justifying liability for those able to keep their hands clean of the immediate killing and even to avoid leaving a paper trail of direct orders. In international criminal law, the doctrine of joint criminal enterprise serves the same purpose as the conjunction of conspiracy and complicity doctrine within Anglo-American criminal law. This doctrine allows for liability despite less specified forms of direct contribution to the underlying criminal acts. Nonetheless, an overall causal connection between the activities of the participants in the enterprise and the direct perpetrators must still be found. In Nahimana's case, this meant showing that his earlier influence on RTLM continued into the period of the active killing. On appeal, he was able to convince the court that the connections between his contributions to the station's ideology and the unfolding massacre did not, in fact, meet the rather ill-defined causal threshold of actual commission of the crime, although his conviction for instigating the crime of genocide remained, on the basis of those contributions.

The wayward path of Nahimana's trial and appeal reveal the inherent instabilities of complicity, as much a matter of doctrine as of concept. These instabilities arise because in fact the bases for accomplice liability vary, relying here on direct causation, there on atmospheric conditioning, given focus by the specificity of intent and capacity for self-control, and always left by a background consideration of the magnitude of the evil. Within the well-defined binaries of accomplices keeping watch while the triggermen rob, these instabilities are well managed: mens rea can be shown to be shared, and the intersection of roles is tightly bound enough that specific causal inquiries can be put aside. But in more diffuse organizational or ideological contexts, the several bases of complicity verge on unmanageability, leading to divergent judgments about whether any causal condition is or needs to be met.

V Participatory Intent versus Knowledge

We have seen that the conduct component of accomplice liability is not easily understood in terms of causal difference-making, given the range of ways an accomplice can contribute to a principal's outcome—from the marginal contribution of attendance at an illegal jazz concert to the attempted interception of a warning telegram, to the amplification of a climate of collective mistrust and dehumanization. A corollary of the widely varying act requirement in complicity doctrine has been greater doctrinal focus on the question of the intent required for liability. The hornbook rule, as I mentioned above, is that the accomplice must have an intent to further the commission of the crime by the principal: a lookout offers his surveillance with the aim of enhancing his partner's chance to break in, a Mob accountant keeps the books in order to help the usury business profit. I have elsewhere described the requirement as involving a "participatory intent"—an intent or purpose to do one's part in a collective act, such that one's own personal efforts are directed at achieving the collective aim. Thus, for example, we consider the lookout in the burglary an accomplice not just because he is standing at the door but because he sees himself as standing at the door in order to help achieve the shared goal of a successful liberation of the store's goods. The accountant, likewise, tailors her accounting to the aim of understanding the profits and losses of the (illegal) business. Were the situation to change—say it became clear that a lookout would be more useful on another side of the building—then an accomplice who genuinely aims at enabling the burglary would move. Such counterfactual dependence, between the instrumental act of the secondary party and the aim of the group (or the principal), reflects the intentional structure of complicity.

Attention to the ways individuals intentionally cooperate, and so build and live social lives, has become an exceedingly rich area of philosophical inquiry. Work by Margaret Gilbert, Michael Bratman, Seumas Miller, John Searle, and Raimo Tuomela, among others, has transformed our understanding of human social agency. Many philosophers now understand cooperation not as constructed from ordinary, first personal intentions ("I'll do this, if you'll do that") but as reflecting a more radically social form of agency ("I'll do this as part of our doing that").
Much of this scholarship raises questions that go beyond issues of accomplice liability, such as the difference between bare coordination and full cooperation, the ethical obligations that arise from (and may be constitutive of) cooperation, the ontology of social groups, and the reducibility of participatory intentions to ordinary individual intentions. But there is important carryover, and potential cross-fertilization, between law and philosophy in this area. The first site of convergence concerns the basic structure of the accomplice's intent, whose distinctive character is illuminated by the philosophical concepts of joint action and intentionality. But the real value may lie in the contributions of philosophy of action to two other standard questions within complicity law: the alienated accomplice, and the knowing facilitator.

Take first the alienated accomplice—the person who is indifferent to the success of the venture as a whole (perhaps because he does not profit from it) but nonetheless deliberately contributes to the venture. Individuals participate in collective ventures for a variety of reasons, including desire to profit and fear of repercussions if they refuse. In any of these cases, an accomplice put to trial might say, “I didn’t intend to help the principal succeed—I was just doing my job.”

A powerful example of this is the case of James Maxwell, who was tapped by the Ulster Volunteer Force to lead a car of men he knew were up to no good to the location they requested, where they subsequently planted a bomb. In his defense, he said he neither shared their mission nor knew the plan they meant to carry out; hence he lacked the intent to further their pipe-bombing of an inn. Under a certain understanding of participation, that would be correct. Indeed, the language of American complicity law suggests that one needs “a stake in the venture,” something more than mere association, to be an accomplice. But the language is misleading if it suggests that the accomplice must be subjectively attached to the mission of the principal. The actual standard in law is functional, not subjective: one is deemed to satisfy the standard if one's acts are guided counterfactually by the principal's aim—however one feels about that aim. In the Peoni case, the issue of intent arose because Peoni had sold counterfeit bills to one Regno, who then sold them on again; the question was whether Peoni was Regno's accomplice in the second sale. Peoni was acquitted, not because of his attitude toward Regno's sale but because once he had sold Regno the bills, he did nothing to further Regno's subsequent sale, hence there was no reason to conclude that Peoni had an intent to participate in Regno's crime, (p. 163) only an intent to commit his own individual crime of selling the false notes. It would have been a different matter if Regno had been a regular customer of Peoni, such that Peoni was dependent on Regno's success in passing on the bills, thus generating further business; then it could have been said of Peoni that “he [sought] by his action to make it succeed.”

So a subjective attitude of identification is not necessary so long as other evidence can show the integration of the accomplice's act into a plan of the principal. This makes sense within law, given the difficulty of proving something as introspective as identification. But it makes sense philosophically as well. Once we see joint action as both pervasive in our environment and constitutive of our social world, we realize that the constraints on participation must be very weak, to accommodate this pervasiveness. A functional understanding of joint action, manifest in the counterfactual dependence of the accomplice's act on the principal's aim, covers the territory of social action from the behavior of animals, to children, to interdependent conventions of trust and reciprocity underlying more complex social behavior.

A functional understanding of complicity does, however, leave open another question: whether knowing but otherwise indifferent facilitation constitutes complicity. These cases typically arise where the secondary party provides a routine good or service to another actor, aware that the principal will make use of the good or service to commit another crime. Standard examples include Internet services that permit posting ads for prostitution services, gun sellers who have reason to believe the gun will be used in a crime, or laborers performing basic chores (such as cooking or field-clearing) that play a role in a criminal enterprise. Courts and legislatures have struggled with the policy question of whether to burden providers of these goods with the risk of criminal implication. But an analytical, philosophical question is prior: is there really a difference between the alienated accomplice, mentioned above, and the mere knowing facilitator? Can the notion of participatory intent make the distinction?

Lessons from more basic philosophy of action serve well here: the distinction between intentional (purposive) action and action done with the awareness of side effects is real, and crucial to understanding how we integrate specific aims into our more general plans. As both Bratman and Antony Duff have argued, while our decisions to act incorporate our awareness of the consequences of those acts, there remains a difference between, say, acting
with the intent to cross a lawn, knowing it will track the snow, and acting with the intent to track the snow. In the second case, but not the first, failure to produce the tracks will result in a shift in plans, perhaps a redoubling of the path. The difference, in other words, goes to the core of intentional agency.

Now, having the analytical distinction in hand does not resolve the moral or legal treatment of someone who acts knowing that effects will be produced. While the distinction may not be relevant to the permissibility of the action, it will bear on the character of the agent, contributing to both a retributive assessment and a calculation of the risk posed by him. As T. M. Scanlon notes, it would be mistaken to think, for example, that the permissibility of an act might vary, simply in virtue of the attitude taken by the actor—for example, a bombing raid might be deemed permissible if done by a pilot who seeks a military target, knowing of civilian collateral casualties, but be impermissible if done by a pilot seeking civilian casualties, aware that a military target will be taken out. Nonetheless, we might decide that a distinction between the two cases is relevant to our treatment of the pilots, for one might pose a greater risk of escalating violations of the law of war.

Similarly, in the context of complicity, we might also decide that the deterrence advantages of treating nonintending facilitators outweigh the risk of chilling their legal behavior. Or we might decide that the implicit moral condemnation of a criminal conviction requires the specific wicked purpose of violating the law or harming another, rather than simple indifference to normative constraints. Such a judgment is contextual and complex, reflecting an understanding of the policy goals and meaning of criminal punishment. But it must not be seen as a direct function of complicity doctrine. Efforts at law reform have in fact recognized this, by seeking to carve out criminal facilitation as a distinct and lesser offense, as in the Model Penal Code's proposals for a new offense. The weaker criterion in international criminal law, which requires only recklessness on the secondary party's part as to the principal's commission of the crime, represents a substantial, even dangerous, weakening of the standard, and so confuses complicity law as well.

VI From Doctrine to Philosophy, and Back Again

The philosophical lesson we might derive from these doctrinal investigations is that our systems, attitudes, and institutions of responsibility respond to a variety of intuitions, instrumental goals, and epistemic constraints. These appear in the guise of formal requirements, for example of causation—requirements honored as much in the breach as in the observance. Within a project of philosophical reform of complicity law, there is therefore ample room to move doctrine in the direction suggested by the Model Penal Code and the Law Reform Commission: toward an inchoate theory of complicity, which predicates liability on the attempt to aid rather than on what is actually done. I favor such an approach to doctrine myself, and have written that it offers the best interpretation of the causal requirement we find in doctrine: causation is necessary as a type- and not a token-requirement. That is, while the accomplice's act must be of the sort that could have made a difference to the commission of the principal's crime, it need not be shown to have actually made a difference.

A virtue of such an approach is that it makes it possible to square complicity doctrine with a more circumscribed theory of punishment, one aiming forward at risk-reduction, whether through deterrence, treatment, or incapacitation. Once we realize that a Judge Tally who tries and fails to intercept a warning telegram is as dangerous as a Judge Tally who succeeds, an inchoate theory of complicity becomes compelling. But outside the conversation of the reformers, in the messier world of real penal and social institutions, the inchoate theory of accomplice liability also seems incomplete. The issue is not just one of reconciling an instrumental approach to punishment with atavistic elements of retributivism in our moral intuitions—and the belief that punishment ought to track harm produced, not merely harm intended. The argument about the significance of resulting harm is familiar, but what we may learn by looking specifically at complicity is the way these other bases of accomplice liability, including motive and role, form of contribution, and specificity of intent, all play a role in judgments not just of threshold liability but of the appropriate penal response. If a more realistic picture of accomplice liability leaves us, as Michael Moore suggests, with a doctrine more mosaic than linear, that doctrine reflects the real polyvocal and polyvalent system of moral judgment in which we live.

Notes:

(1.) These theories of responsibility and punishment are put forward as caricatures here; they will be elaborated
below.

(2.) Many jurisdictions hold that possession or display of a loaded gun can, with other evidence, suffice for attempted murder. See, e.g., State v. Walker, 705 So. 2d 589 (Fla. Dist. Ct. App. 4th Dist. 1997) (prima facie case for attempted murder in case of a student who brought a loaded gun to school, having told witnesses that he was going to kill the assistant principal); Cohen v. Wyoming, 191 P.3d 956 (Wyoming 2008) (attempted murder could be found in case of defendant reaching for a gun when stopped by a police officer).

(3.) Assume, for the sake of the example, that the gun is properly licensed.

(4.) State ex rel. Martin v. Tally, 102 Ala. 25 (1894). This is a rough and opportunistic adaptation.

(5.) William Shakespeare, Othello [1604].

(6.) Prosecutor v. Ferdinand Nahimana, Jean-Bosco Baraygwiza, Hassan Ngeze, Case No. ICTR-99–52-T, Trial Chamber Summary [2003].

(7.) If S's instigation goes beyond "mere" encouragement, S can be liable as a perpetrator of an attempt. See, e.g., U.S. v. Church, 29 Mil. J. Rptr. 679 (Ct. Milit. Rev. 1989) (S liable for attempted murder, having provided government agent posing as hitman with weapon, photos, and detailed plans).

(8.) Powel and Daniels, English [1999] 1 AC 1.

(9.) At the least, there would be uncertainty in the UK treatment of the case.

(10.) U.S. v. Peoni, 100 F.2d 401 (2nd Cir. 1938).


(12.) The exception to the uniform treatment of accomplices and principals is Germany, where secondary liability is formally distinguished. For example, the U.K. Aiding and Abetting Act directs that liability be equivalent, as does the Model Penal Code. In France, e.g., Art. 121–6 of the Criminal Code directs that the complice be punished as a principal offender. In the United States, capital liability for nontriggermen actors has been disfavored since Tison v. Arizona, 481 U.S. 137 (1987), absent a specific finding of reckless indifference to human life by the accomplice.


(15.) Model Penal Code, Sec. 2.06(2)(a).

(16.) The absence of a causation requirement will receive a later defense.


(19.) See chapter 7 here, as well as Hart & Honoré, Causation and the Law, Ch. 1.

(20.) Assuming the thieves knew or should have known death would result; felony murder would also result in murder.
(21.) This is a so-called inus condition: an insufficient but nonredundant part of an unnecessary but sufficient condition, in that the death could have been produced in many ways, but happened to be produced by this very configuration of elements. See Mackie, *Cement of the Universe*, pp. 62–63.

(22.) Strictly speaking, each is a co-perpetrator rather than an accomplice.

(23.) See *my* *Complicity: Ethics and Law for a Collective Age* (New York: Cambridge University Press, 2001), Ch. 3.

(24.) Under felony-murder doctrine, only the common plan to rob must be shown, since murder liability will flow from the underlying felony.


(27.) “Ah, balmy breath, that doth almost persuade Justice to break her sword,” Othello says while kissing the sleeping Desdemona farewell. *Othello*, Act 5, Scene 2.

(28.) On the other hand, as Fletcher notes, if the doctor knows that the patient has asked for assistance while the nurse does not, the nurse may lack an excuse or mitigation that the doctor has. George Fletcher, *Rethinking Criminal Law* (Boston: Little Brown, 1978), Sec. 8.6.1.

(29.) Glanville Williams, *Criminal Law: The General Part* (London: Stevens and Sons, 2d ed. 1961), Sec. 130 (Parties to the same act guilty of different degrees of crime).

(30.) Fletcher, *Rethinking*, Sec. 8.7.1.


(33.) Nahimana, Appeal, p. 513. On appeal, the standard of proximate causation could not be met for the earlier broadcasts, but could for the later ones.

(34.) Wilcox v. Jeffery [1951] 1 All ER 464.

(35.) Matters are slightly different for co-perpetrators, where each aims to do part of the completed crime, but does not necessarily aim to assist the other's commission of that crime.

(36.) See *my* *Complicity*, Ch. 3.


(39.) The words are Judge Learned Hand's, from *U. S. v. Peoni*, 100 F.2d 401 (2d Cir. 1938).

(40.) This point is powerfully made by John Searle, in *The Construction of Social Reality* (New York: Free Press, 1997).


(44.) See the Model Penal Code, Comment 2.06, p. 318 (restricting facilitation liability to rendering of substantial aid).


(47.) Michael Moore, “Causing, Aiding, and the Superfluity of Accomplice Liability,” *University of Pennsylvania Law Review* 156: 395–452. For Moore, the many bases of complicity suggest that the doctrine itself can and should be replaced by existing doctrines tailored to, variously, risk, direct causation, and vicarious liability. In my view, the doctrine is best understood in terms of the range of underlying factors, with risk playing a unifying role. But this is an issue of doctrinal taxonomy, not philosophy.

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